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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUIS MIGUEL MUNIZ, Defendant and Appellant.	B197185 (Los Angeles County Super. Ct. No. KA072234)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip S. Gutierrez, Judge. Affirmed.

George A. Gallegos, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Luis Miguel Muniz appeals from the judgment entered following his convictions by jury on count 1 – first degree murder (Pen. Code, § 187), count 2 – shooting from a motor vehicle at another person (Pen. Code, § 12034, subd. (c)), and two counts of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187; counts 3 & 4) with, as to each of the above offenses, firearm use (Pen. Code, § 12022.53, subd. (b)), personal discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), and personal discharge of a firearm causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)). The court sentenced appellant to prison on count 1 to 25 years to life for the murder, plus 25 years to life (Pen. Code, § 12022.53, subd. (d)), with a consecutive term as to each of counts 3 and 4 of life with the possibility of parole for the attempted murder, plus 25 years to life (Pen. Code, § 12022.53, subd. (d)).[1]

FACTUAL SUMMARY

1. *Background.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that Carlos Molinar was a friend of Gustavo Ramirez (the decedent) and Hector Escamilla. Jennifer Escamilla (Jennifer) was Escamilla's sister.

Escamilla and appellant had been friends until appellant began dating Jennifer. Escamilla told appellant to stop dating Jennifer, appellant refused, and, according to Escamilla, appellant and Escamilla exchanged bad words.

Molinar knew appellant through Escamilla and Jennifer, and because Molinar had seen appellant on the streets periodically during the last few years prior to 2005. Molinar testified that, on one occasion, Escamilla and appellant were going to fight. Molinar heard Escamilla say to appellant, "'Just leave my sister alone, ... She's already starting a family' . . . . " Molinar guessed that Escamilla and appellant did not like each other. Molinar and Janneth Hernandez, Molinar's girlfriend, knew appellant by his nickname, Tomba.

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[1] The court stayed sentence on count 2 pursuant to Penal Code section 654.

According to Jennifer, appellant drove a black Chevrolet Avalanche. The truck had specialty rims, and four televisions inside. Jennifer had been in the truck numerous times and had driven it. In August 2005, Jennifer was in the truck and saw a gun inside the truck's center console. On another occasion, Jennifer and appellant were at someone's home and Jennifer saw appellant pull out the gun and hold it in his hand.

Jennifer periodically dated appellant for about seven years. In August 2005, Jennifer terminated her relationship with appellant. About a week or two before September 7, 2005, Jennifer saw appellant and Escamilla arguing with each other.[2] On September 6, 2005, appellant, driving the Chevrolet, visited Jennifer. Jennifer did not see appellant again until she saw him at the trial.

Hernandez testified that appellant drove a black Chevrolet Avalanche. On several days perhaps a month before September 7, 2005, Hernandez had seen appellant drive by her house in the Chevrolet. On September 6, 2005, Hernandez and another person were in the Chevrolet, which appellant was driving. Appellant said something to Hernandez about problems he was having with Escamilla. Hernandez testified, "[appellant] said that [appellant] and Hector had like a dispute. . . . they weren't getting along and he didn't have a problem taking care of Hector." Hernandez did not see appellant again until she saw him at trial.

2. *The Offenses.*

a. *The Testimony of Escamilla.*

Escamilla testified that about 8:00 p.m. on September 7, 2005, Molinar, Ramirez, and Escamilla were walking northbound on Rowland near the corner of Rowland and Bessie in El Monte. Ramirez was between Molinar and Escamilla. There were two to three feet between Molinar and Ramirez, and two to three feet between Ramirez and Escamilla. The three were close to each other and there were about eight feet between Molinar and Escamilla.

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[2] Four years earlier, appellant physically fought with one of Jennifer's former boyfriends who was the father of her child.

Escamilla testified that appellant drove up in a Chevrolet truck after making a left turn from Bessie onto Rowland (apparently southbound). The truck was a black Chevrolet Avalanche with a customized front that looked like the front of a Cadillac Escalade, and the truck had big wheels. Escamilla had seen appellant as the driver and sole occupant of the Chevrolet every day for two months prior to September 7, 2005. Escamilla had seen appellant driving the truck earlier on September 7, 2005.

Escamilla testified "as this [truck] approach[ed], he approached on us. . . . he turned. So he actually stopped. He turned. He looked at us and that's when he said, 'Hey, mother fuckers,' . . . 'you're still here.' And he opened fire." Appellant was the driver of the truck. Escamilla later testified that appellant drove up, stopped, "reached out" and made the above quoted statement to Escamilla and his companions. Escamilla also testified appellant "pulled out his weapon and, . . . actually shot against us." (*Sic*.)

Escamilla further testified that after appellant made "the statement" "he turned around. He shot at us and we scattered." Appellant fired after he had reached his right hand across his body to his left shoulder. Appellant's entire arm came outside the truck, and the gun was outside the truck's window. Appellant used a chrome gun, and fired at most four or five shots. After the shooting, the truck travelled southbound on Rowland. Sometime after the shooting, Escamilla saw appellant drive by Escamilla's house.

Escamilla identified appellant at trial as the person who made the statement in the truck. Escamilla testified he knew it was appellant because he saw appellant's face, appellant dated Jennifer, and if Escamilla saw a face, he would remember it. Escamilla also testified he knew appellant was the person who drove up in the truck because appellant was the only person who had driven it in the past. After the day of the shooting, Escamilla did not see appellant again until trial.

During cross-examination, Escamilla testified that, at the preliminary hearing, he testified it was nighttime and he could not see appellant's face. Escamilla testified at trial that he had been confused at the preliminary hearing, but his memory about everything returned at the trial. Appellant asked whether Escamilla's preliminary hearing testimony that it was nighttime and Escamilla could not see appellant's face was true. Escamilla

replied he had no comment. Escamilla also testified that his preliminary hearing testimony was true.

Escamilla also testified during cross-examination at trial as follows. Escamilla remembered testifying on direct examination that the reason he believed appellant was driving the vehicle was that appellant was the only person who had driven it. That was also how Escamilla was determining that appellant was the shooter. When Escamilla testified on direct examination that, after the incident, appellant passed by Escamilla's house, Escamilla did not see appellant's face but just saw what Escamilla believed was the same vehicle. Escamilla never saw appellant's face that day. When Escamilla heard the shots, it was dark and he was about 20 feet from the driver of the vehicle.

During redirect examination, Escamilla testified as follows. After the shooting, Escamilla ran home and a police officer came to his home. Escamilla told the officer that Escamilla immediately had recognized the driver as Escamilla's sister's former boyfriend, and that the driver had fired three or four shots. Escamilla told two detectives that Escamilla recognized appellant's truck and saw that appellant was its driver. Escamilla also told the detectives that he had known appellant for years, and he identified appellant as the shooter to the detectives.

During redirect examination, the prosecutor showed a photographic identification folder to Escamilla. Escamilla testified he had circled photograph number 2 because it depicted the person who did the crime. The prosecutor asked whether the photograph depicted the person who "shot at you guys" and Escamilla replied yes. Escamilla testified at trial that appellant and Escamilla used to talk, and Escamilla recognized appellant's voice on the night of the shooting.

b. *The Testimony of Molinar*.

Molinar testified he had seen appellant driving a black Chevrolet Avalanche or Escalade truck more than 10 times during the previous months. The truck had "spinner rims" and probably four or five televisions inside.

On September 7, 2005, Escamilla, Ramirez, and Molinar were walking together. Ramirez was between Escamilla and Molinar.

Molinar saw the truck pass them. The truck stopped, then backed up about 10 feet. The driver's window of the truck was down. Molinar did not see the driver's face. However, Molinar heard the driver say, "'What's up now, mother-fuckers?'" and saw the driver begin shooting. Molinar, who had heard appellant's voice before, recognized the driver's voice as that of appellant. Molinar saw no one else in the truck. Molinar testified the driver "started shooting at us and we started running." Molinar heard about three or six shots. One of the bullets struck Ramirez, mortally wounding him. Molinar helped Ramirez, then ran to Hernandez's home and told her that Tomba had shot Ramirez. The prosecutor asked Molinar how he knew it was Tomba who did the shooting, and Molinar replied, "Just have that gut feeling. You just know."

Molinar testified that, after the shooting, he went to the police station and told police "that the person [Molinar knew] as Tomba, Luis Muniz, drives that truck." Molinar described the shooter to police, but Molinar told police that he did not see the shooter's face. The prosecutor asked if Molinar told the police whether he could identify the shooter, and Molinar indicated he did. The prosecutor asked what Molinar told police, and he replied "It's a while ago, but I'm just for sure it's this guy right here." Molinar also testified that, on the night of the shooting, he initially told police at the police station that appellant drove the truck, but denied to the police that Molinar could identify the shooter. Molinar denied he could identify the shooter because Molinar did not want anything to happen to his family.

The next day, Molinar told police that he had seen the shooter. Molinar testified he changed his mind and told police what had happened because he wanted to see appellant "put away" and appellant was a "piece of shit." Police showed Molinar a photographic identification folder containing six photographs, and Molinar selected appellant's photograph as depicting Tomba, the person who shot Ramirez.

During cross-examination, Molinar testified he did not see the shooter's face on the night of the shooting. Appellant asked Molinar whether, when Molinar testified that Molinar knew it was appellant, this was based on Molinar's "gut" and not based upon Molinar actually seeing appellant's face. Molinar replied, "Correct. Guess you could say

that." At the preliminary hearing, Molinar testified he told police that he did not see the shooter. At trial, Molinar testified the vehicle's windows were tinted and all of them were up, and the only way he could have seen inside the vehicle would have been through the driver's window.

Molinar testified at the preliminary hearing that Escamilla had had an ongoing argument or battle with appellant because of Escamilla's sister, and "he" had treated her badly. Molinar also testified at the preliminary hearing that Escamilla told appellant that if appellant did not leave Escamilla's sister alone, something very bad was going to happen.

During redirect examination, Molinar testified that on September 13, 2005, he spoke with two detectives. The prosecutor asked Molinar "Do you remember telling them that you saw the suspect shoot you guys the night of the murder[.]" Molinar indicated yes.

Ramiro Silva worked at a building in the 4100 block of Rowland. Shortly after 8:00 p.m. on September 7, 2005, Silva was outside when he heard a truck stopping nearby. Silva heard two shots and, after a pause, a third shot. Silva then heard a screeching tire and the sound of a truck accelerating away. Silva saw a black Chevrolet truck with tinted windows and very large rims driving southbound on Rowland, passing Silva's building. About 20 minutes later, Silva saw paramedics, and a man was lying by the curb.

Police recovered two .45-caliber casings from the scene. On June 14, 2006, police arrested appellant in Las Vegas. Appellant presented no defense evidence.

CONTENTIONS

Appellant claims (1) the trial court erroneously failed to give CALJIC No. 2.71 to the jury, (2) the trial court erroneously gave CALJIC No. 8.66.1 to the jury, (3) the trial court erroneously admitted evidence that appellant was seen carrying a gun, (4) appellant received ineffective assistance from his trial counsel, (5) there was insufficient evidence supporting appellant's convictions, and (6) this Court should reduce appellant's convictions to any lesser included offense(s).

DISCUSSION

1. *The Trial Court Did Not Reversibly Err By Failing to Give CALJIC No. 2.71.*

As mentioned, Hernandez testified that on September 6, 2005, appellant said something to Hernandez about problems he was having with Escamilla, and "[appellant] said that [appellant] and Hector had like a dispute. . . . they weren't getting along and he didn't have a problem taking care of Hector." The trial court did not give CALJIC No. 2.71 or 2.72 to the jury.[3]

Appellant claims the trial court erroneously failed to instruct the jury, using CALJIC Nos. 2.71[4] and 2.72,[5] that the jury had to view with caution appellant's extrajudicial statements to Hernandez. Even if the trial court erred by failing to give CALJIC No. 2.71, there is no need to reverse the judgment. This is not a case in which the parties presented conflicting evidence as to the precise words used in appellant's statements to Hernandez, their meaning or context, or whether they were remembered and accurately reported. The court gave various instructions pertaining to witness credibility (see fn. 4), thus providing guidance on how to determine whether to credit Hernandez's testimony concerning appellant's statements. The alleged instructional error was not prejudicial. (Cf. *People v. Carpenter* (1997) 15 Cal.4th 312, 392-393; *People v.*

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[3] The court instructed on the believability of a witness (CALJIC No. 2.20), discrepancies in testimony (CALJIC No. 2.21.1), a witness willfully false (CALJIC No. 2.21.2), weighing conflicting testimony (CALJIC No. 2.22), and the sufficiency of the testimony of one witness (CALJIC No. 2.27).

[4] CALJIC No. 2.71, states, "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [*Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution*.]" (Italics added.)

[5] CALJIC No.2.72, states, "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any [confession] [or] [admission] made by [him] [her] outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime [nor is the degree of the crime]. The identity [or degree of the crime] may be established by [a] [an] [confession] [or] [admission]."

Bunyard (1988) 45 Cal.3d 1189, 1224-1225; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

As for CALJIC No. 2.72, the trial court did not err by failing to give that instruction in order to tell the jury that they had to view appellant's statements with caution. That instruction pertained to the corpus delicti rule, not to whether appellant's statements had to be viewed with caution.

Moreover, even if appellant is arguing that the trial court erred by failing to instruct on the corpus delicti rule, there is no need to reverse the judgment. The corpus delicti rule "requires that the corpus delicti of a crime be proved independently from an accused's extrajudicial [statements]. [Citations.] 'The corpus delicti of a crime consists of two elements, the fact of the injury or loss or harm, and the existence of a criminal agency as its cause.' [Citation.] Such proof, however, may be circumstantial and need only be a slight or prima facie showing 'permitting the reasonable inference that a crime was committed.'" (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) Neither the identity of the defendant as the perpetrator of a crime, nor the degree of a murder, is part of the corpus delicti. (*People v. Valencia* (2008) 43 Cal.4th 268, 297; *People v. Jablonski* (2006) 37 Cal.4th 774, 827.)

Appellant conceded during jury argument that someone shot and killed Ramirez. Appellant's brief challenges the sufficiency of the evidence only as to (1) the identification evidence supporting his convictions, and (2) the evidence of premeditation and deliberation as to counts 1, 3, and 4. Appellant does not dispute the sufficiency of the evidence that someone shot from a motor vehicle at Ramirez (count 2),[6] murdering him (count 1) and attempting to murder Escamilla (count 3) and Molinar (count 4). The testimony of Molinar, Escamilla, Jennifer, and Hernandez, excluding any statements by

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[6] Count 2 charged a violation of Penal Code section 12034, subdivision (c). That subdivision states, in relevant part, "(c) Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony . . . ." The information alleged in count 2 that appellant discharged the firearm at Ramirez, and the jury, by their verdict, convicted appellant of shooting from a motor vehicle "at Gustavo Ramirez" "as charged in Count 2 of the Information."

appellant, provided the requisite slight evidence of the crimes. Any alleged trial court error in failing to give CALJIC No. 2.72 was not prejudicial. (Cf. *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

2. *The Trial Court Did Not Err by Giving CALJIC No. 8.66.1.*

a. *Pertinent Facts.*

The trial court instructed the jury on attempted murder and concurrent intent, using CALJIC No. 8.66.1. That instruction read, "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. [This zone of risk is termed the 'kill zone.'] The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ['kill zone'] [zone of risk] is an issue to be decided by you."[7]

During jury argument, the People argued, inter alia, as follows. Appellant was guilty of the attempted murder of Escamilla (count 3), who was the target of appellant's intent to kill. Appellant was guilty of the murder of Ramirez (count 2) on the theories (1) Ramirez was a nontargeted victim towards whom appellant had a concurrent intent to kill, (2) appellant's intent to kill Escamilla transferred to Ramirez, and (3) appellant harbored implied malice towards Ramirez. Appellant was also guilty of the attempted murder of Molinar (count 4), a nontargeted victim towards whom appellant had a concurrent intent to kill. Appellant does not assert that Escamilla or Molinar were injured.

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[7] The word "or" was added by interlineation (as shown by italics below) to the last sentence of the written instruction so that that sentence read: "Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ['kill zone' *or*] [zone of risk] is an issue to be decided by you." (Italics added.) The last sentence of the oral instruction was: "Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within the kill zone or zone of risk is an issue to be decided by you."

b. *Analysis.*

Appellant claims the trial court reversibly erred as to counts 3 and 4 by giving CALJIC No. 8.66.1. We disagree. In *People v. Bland* (2002) 28 Cal.4th 313, 326-331 (*Bland*), our Supreme Court held that the doctrine of transferred intent does not apply to attempted murder.

However, *Bland* stated, "The *Ford* [*v. State* (1993) 330 Md. 682 [625 A.2d 984]] court explained that although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' '*The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.* For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death.'" (*Bland, supra*, 28 Cal.4th at pp. 329-330, italics added.)

Bland continued, "'The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated

zone. This situation is distinct from the "depraved heart" [i.e., implied malice] situation because the trier of fact may infer the actual intent to kill which is lacking in a "depraved heart" [implied malice] scenario.' [Citation.]"[8] (*Bland*, *supra*, 28 Cal.4th at p. 330.)

The language of CALJIC No. 8.66.1 is clearly based on language from *Bland*. We note that CALJIC No. 8.66.1 states, inter alia, "The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator *intended* to kill the primary victim *by killing everyone in that victim's vicinity*." (Italics added.)

Reasonably understood, the instruction indicates (1) the perpetrator's *intent* relates not only to the killing of the primary victim but to the *means* by which the primary victim will be killed, and (2) *those means are the killing of everyone* in the primary victim's vicinity. The perpetrator not only intends to kill the primary victim but *intends to employ a particular means to do so: killing everyone*. A perpetrator might *kill* a victim by means which kill others without the perpetrator intending to kill the others, but one cannot logically *intend* to kill a victim by means which kill others without the perpetrator intending to kill the others.

A perpetrator cannot, therefore, logically *intend* to kill the primary victim by killing others *with only implied malice*. CALJIC No. 8.66.1, reasonably understood, indicates, inter alia, that the intent *to kill* is concurrent when the *nature and scope of the attack*, while directed at a primary victim, are *such that* it is reasonable to *infer* the

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[8] *Bland* continued, "California cases that have affirmed convictions requiring the intent to kill persons other than the primary target can be considered 'kill zone' cases even though they do not employ that term. In *People v. Vang* (2001) 87 Cal.App.4th 554, 563-563, for example, the defendants shot at two occupied houses. The Court of Appeal affirmed attempted murder charges as to everyone in both houses--11 counts--even though the defendants may have targeted only one person at each house. 'The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed.' (*Id.* at pp. 563-564; see also *People v. Gaither* (1959) 173 Cal.App.2d 662, 666-667 [defendant mailed poisoned candy to his wife; convictions for administering poison with intent to kill affirmed as to others who lived at the residence even if not a primary target].)" (*Bland, supra,* 28 Cal.4th at p. 330.)

perpetrator *intended* to kill the primary victim by killing, *and intending to kill*, everyone in that victim's vicinity.

Appellant argues CALJIC No. 8.66.l's "use of the phrase nature and scope of *the* attack fails to relate that the jury may only infer defendant intended to kill from evidence demonstrating that the means he employed had the capability to kill everyone in a particularly targeted area intentionally created by the defendant *and* that the defendant specifically intended to kill everyone in the targeted area to ensure the death of his primary target."

However, CALJIC No. 8.66.1 contains more than the mere phrase "nature and scope of the attack." Nothing in the instruction precluded the jury from considering "capability" to kill everyone as a factor relevant to whether appellant intended to kill everyone.

Appellant argues CALJIC No. 8.66.1 fails to mention that "the method used must be an escalated mode of attack, devastating enough to permit the inference that the defendant intended to kill." However, *Bland* did not hold that the use of the term "escalated" or "devastating" was the sine qua non of a valid concurrent intent instruction. These terms of degree or extent are at best conclusory characterizations of facts the jury would consider in its determination of whether the *nature and scope* of the attack are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity.

Appellant similarly argues that, absent an instruction that the attack must be devastating enough to kill everyone in the group, the jury will erroneously infer intent to kill from conduct evidencing only implied malice. However, appellant fails to distinguish two situations: a perpetrator *killing* nontargeted persons with only implied malice, and a perpetrator *intending* to kill nontargeted persons with only implied malice. CALJIC No. 8.66.1 is not addressing the first situation, and the second situation is logically impossible. For reasons previously discussed, the inference which the instruction permits is an inference of an intent to kill the primary victim by killing, *and intending to kill*, everyone in that victim's vicinity.

Appellant argues the instruction "creates the impression that the jury may infer *from the location* of secondary victims that the defendant intended to kill anyone who is in the vicinity of the primary target." (Italics added.) However, the instruction does not use the term "location." The instruction indicates that the jury may infer *from the nature and scope of the attack* that the defendant intended to kill anyone in the vicinity of the primary target. As mentioned, the instruction precludes an inference of concurrent intent to kill based on criminal negligence or strict liability relating, e.g., to the location of potential nontargeted victims. The location of potential nontargeted victims is a factor for jury consideration.

Appellant argues CALJIC No. 8.66.1 fails to instruct correctly on the issues of "the proximity of the offender to his primary target or the [target's] proximity to others." We disagree. Such proximity issues are factors for jury consideration. No further instruction on the vicinity issue was required.

Appellant argues "Simply referring to the nature and scope of the *attack* could be understood to mean that anyone injured was in a zone of danger, the scope of that zone being defined by the locations of the various victims who happened to get injured inadvertently versus defining the scope of the kill zone based on the area defendant intended to create and anticipated would kill people."

However, the jury reasonably would have understood the location of injured persons to be a factor to be considered in determining whether the nature and scope of the

attack were such that it was reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity, a determination which precludes liability based on inadvertence or strict liability. In any event, once it is determined that the nature and scope of the attack are such that it is reasonable to infer the perpetrator intended to kill the primary victim *by killing everyone* in that victim's vicinity, this means the perpetrator *intended to kill everyone* in that victim's vicinity. In that circumstance, the perpetrator necessarily intended to create a kill zone, that is, an area the persons in which the perpetrator knew would be killed.

Of course, even if the jury in the present case reasonably could have defined the scope of the zone of danger merely by the locations of injured nontargeted persons, it is not clear why this would compel reversal of appellant's convictions on counts 3 and 4, since it appears neither Escamilla nor Molinar was injured, Escamilla, if anyone, was the target of appellant's intent to kill, and Ramirez was the victim as to count 1.

Appellant argues CALJIC No. 8.66.1 violates due process because it permits the jury to presume intent. CALJIC No. 8.66.1 does not presume intent. In fact, the instruction told the jury that whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a kill zone or zone of risk was an issue to be decided by the jury.[9]

Appellant argues CALJIC No. 8.66.1 is "unconstitutional because it is vague and ambiguous on the jury's duty to find that the defendant had the essential element of specific intent to kill each particular individual." We disagree. As previously discussed,

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[9] Appellant asserts in conclusory fashion that "Even if the inference in the instruction in [appellant's] case were a permissive one, there would be constitutional error under a Ninth Circuit case. *Hanna v. Riveland* (9th Cir. 1966) 87 F.3d 1034 [*Hanna*]." Appellant waived the issue by perfunctorily asserting his point without argument. (Cf. *People v. Ashmus* (1991) 54 Cal. 3d 932, 985, fn. 15.) In any event, *Hanna* noted "[p]ermissive inference jury instructions are constitutional, . . . 'so long as it can be said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend."' [Citations.]" (*Hanna*, *supra*, 87 F.3d at p. 1037.) In the present case, the inference that the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity flowed more likely than not from the proved fact of the nature and scope of the attack; therefore, no constitutional error occurred.

CALJIC No. 8.66.1, reasonably understood, indicates, inter alia, that the jury reasonably may infer the perpetrator intended to kill the primary victim by killing, *and intending to kill, everyone* in that victim's vicinity. The instruction adequately advised on any duty the jury had to make a finding on the issue. Nor does CALJIC No. 8.66.1 erroneously instruct, in violation of appellant's right to due process, on the issue of the element of a perpetrator's intent to kill everyone in the victim's vicinity.

Appellant argues CALJIC No. 8.66.1 is unconstitutionally "vague and ambiguous because it implies that the scope of the *consequences* of the attack is determinative without explaining that it is the *means of attack* which is determinative." We disagree. Neither the word "consequences" nor the phrase "scope of the consequences" is in the instruction, and neither that word nor phrase is singularly implied by the phrase "nature and scope of the *attack*." (Italics added.) The jury was free to consider the consequences of the attack as a factor when considering the nature and scope of the attack.[10] The instruction permits an inference from the nature and scope of the attack that the perpetrator intends to kill the primary victim "by," that is, through the mean of, killing everyone in that victim's vicinity. CALJIC No. 8.66.1 adequately instructs on the issue of the means of the attack, and is constitutionally sound.

We hold the trial court did not err as to counts 3 and 4 by giving CALJIC No. 8.66.1.[11] Moreover, even if the trial court erred, reversal of the judgment as to those counts is not warranted. As to counts 3 and 4, there was strong evidence of appellant's intent to kill Escamilla and Molinar, respectively, as shown below. Appellant and Escamilla had a hostile relationship as a result of appellant's dating Jennifer. There was evidence appellant had a gun in the center console of his truck. In August 2005, Jennifer terminated her relationship with appellant. About a week or two before Ramirez died, appellant and Escamilla argued.

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[10] For example, a jury could consider not only the fact that the perpetrator fired a hail of bullets but the fact, if true, that each bullet struck someone.

[11] The fact that the language of CALCRIM No. 600 addressing concurrent intent and kill zone issues differs from the language in CALJIC No. 8.66.1 does not compel a contrary conclusion.

Hernandez testified that, on September 6, 2005, appellant said something to Hernandez about problems he was having with Escamilla, and "[appellant] said that [appellant] and Hector had like a dispute. . . . they weren't getting along and he didn't have a problem taking care of Hector." Molinar testified that Escamilla had had an ongoing argument or battle with appellant because of Escamilla's sister, and Escamilla told appellant that if appellant did not leave Escamilla's sister alone, something very bad was going to happen. This was evidence of a prior quarrel and, therefore, evidence of motive to kill.

On September 7, 2005, appellant drove up to Molinar, Ramirez, and Escamilla, stopped, and turned. The driver's side window was down. Appellant shouted profanities at the three men. Appellant held a gun in his right hand and, extending his entire arm out the window, fired multiple shots at Molinar, Ramirez, and Escamilla, who were close together. Appellant was about 20 feet from Escamilla at the time of the shooting. There was evidence that appellant fired high-powered (.45-caliber) bullets. Appellant paused between two shots before resuming the shooting, and one of the bullets penetrated Ramirez's chest, his center mass area. In sum, there was overwhelming evidence that appellant intended to kill Escamilla and Molinar.

Further, during jury argument, appellant argued briefly (two sentences in about fifteen pages of transcribed argument) that there was no evidence that the shooter intended to hit anyone other than Ramirez. However, the bulk of appellant's argument was that there was insufficient evidence that he was the shooter. The jury not only convicted appellant for the attempted murders but found they were premeditated and deliberated. Any trial court error in giving CALJIC No. 8.66.1 was not prejudicial under any conceivable standard. (Cf. *People v. Watson, supra,* 46 Cal.2d at p. 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

3. *The Trial Court Did Not Erroneously Admit Evidence that Appellant Was Carrying a Gun.*

a. *Pertinent Facts.*

On January 16, 2007, appellant filed a document entitled "Motions in Limine 1-12," which included, inter alia, a request to exclude evidence that appellant owned or had a gun. The written motion did not specify the ground(s) (e.g., relevance, Evidence Code section 352, or Evidence Code section 1101) on which appellant sought exclusion of that evidence. The written motion contained no other reference to the gun.

At the January 16, 2007 hearing on the motion, the parties did not argue the issue of the admissibility of the gun. The trial court simply stated, "there was a motion in limine to exclude any evidence that the defendant was ever seen with a gun, and that motion is denied."

Jennifer testified at trial that she had seen appellant with a gun during the times that she had been with him. Jennifer testified that appellant picked her up, they were driving around, and appellant was getting something out of the center console. Jennifer testified she saw it "real fast" and appellant closed the console quickly. Jennifer saw a gun inside the console. This incident occurred in about August 2005. After appellant closed the console, she never saw the gun again.

Jennifer later testified that she had seen a gun on appellant's person once before. During that incident, Jennifer and appellant were at the house of appellant's friend. Appellant had retrieved the gun from his truck. Appellant pulled the gun out and had it in his hand, and Jennifer turned around. The above two incidents were the only times Jennifer had seen appellant with a gun. Appellant did not object to that testimony.

b. *Analysis.*

Appellant claims that Jennifer's testimony that she had seen appellant with a gun was character and other crimes evidence which was inadmissible under Evidence Code section 1101, and excludable under Evidence Code section 352. He also claims admission of the testimony violated his right to due process. The claims are unavailing.

Appellant sought exclusion of the evidence by his motion in limine but did not make clear a specific ground for exclusion, whether Evidence Code section 352, Evidence Code section 1101, his right to due process, or anything else. When Jennifer testified at trial to the effect that she had seen appellant with a gun, appellant posed no objection. Appellant waived the issue of the admissibility of the challenged testimony. (Cf. *People v. Clark* (1992) 3 Cal.4th 41, 125-126; *People v. Morris* (1991) 53 Cal.3d 152, 190; *People v. Benson* (1990) 52 Cal.3d 754, 786-787, fn. 7; Evid. Code, § 353, subd. (a).)

On the merits, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning Evidence Code section 352, or Evidence Code section 1101. (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725; *People v. Memro* (1995) 11 Cal.4th 786, 864.)

Appellant has failed to demonstrate that evidence of his possession of a gun constituted other crimes evidence, since it is not a crime simply to possess a gun. Even if appellant's previous gun possession, including his possession thereof in his car, was other crimes and character evidence, it showed he had access to a gun and, therefore, an opportunity to use it during the present shooting. Accordingly, the evidence was not inadmissible other crimes or character evidence, but admissible under Evidence Code section 1101, subdivision (b) to prove identity, that is, that appellant was the shooter (cf. *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052; *People v. Neely* (1993) 6 Cal.4th 877, 896), and the trial court did not err by failing to exclude the evidence under Evidence Code section 352 (cf. *People v. Cox* (2003) 30 Cal.4th 916, 955-957; *People v. Memro, supra,* 11 Cal.4th at p. 864). No due process violation occurred since, notwithstanding appellant's suggestion to the contrary, the challenged evidence was not propensity evidence, and the application of the ordinary rules of evidence, as here, does not violate due process. (See *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

4. *Appellant Did Not Receive Ineffective Assistance of Counsel.*

Appellant claims he received ineffective assistance of counsel by various alleged failings of his trial counsel. We note at the outset that "'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id*. at p. 217.) Moreover, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

For sake of brevity, we will state here that, as to each and every one of appellant's arguments discussed below (1) we reject the argument on the ground the record sheds no light on why counsel failed to act or acted in the manner challenged, counsel was not asked for an explanation, and we cannot say there simply could have been no satisfactory explanation, and (2) no ineffective assistance of counsel occurred. Accordingly, in our discussion below, we will not repeat the above statement, but will provide additional independent reasons why no ineffective assistance of counsel occurred.

a. *Trial Counsel's Concession that Someone Shot and Killed Ramirez.*

During his opening statement and opening argument, appellant's counsel conceded that someone shot and killed Ramirez, and appellant's counsel indicated the issue was the identity of the shooter. Appellant argues his trial counsel's concession constituted a concession of all issues except identity, and was therefore ineffective assistance of counsel. We disagree. Appellant's concession did not address the issues of whether

appellant harbored malice aforethought, premeditation, or deliberation as to Ramirez, and did not expressly address whether anyone attempted to murder Escamilla or Molinar.

Moreover, the record fails to demonstrate any failings by trial counsel were anything other than competent trial tactics (see *People v. Provencio* (1989) 210 Cal.App.3d 290, 304) designed to establish as much credibility with the jury as possible. (*People v. Fairbanks* (1997) 16 Cal.4th 1223, 1251.) Even if counsel's failure constituted constitutionally deficient representation, appellant has failed to demonstrate that there was evidence that Ramirez was not shot and killed, and appellant has failed to demonstrate prejudice.

b. *Trial Counsel's Stipulation to the Coroner's Testimony.*

At trial, appellant's counsel stipulated the coroner examined Ramirez's body and found that a gunshot wound perforating Ramirez's left arm and penetrating his chest was the sole and proximate cause of his death. Appellant argues the stipulation constituted ineffective assistance of counsel because the coroner could have testified that (as a toxicology report reflects) Ramirez had been using drugs shortly before his death. Appellant also argues the stipulation constituted ineffective assistance of counsel because the coroner could have testified that (as the coroner's report reflects) the fatal bullet traveled from back to front, and upward. Appellant suggests this impeaches the testimony of Escamilla and Molinar since, according to their account, the bullet should have travelled downward in Ramirez's body.

However, the previously recited stipulation did not prevent appellant from eliciting from the coroner the testimony which appellant argues the coroner could have provided; what prevented that was the fact that the coroner was eventually excused as a witness. Further, trial counsel reasonably could have concluded that the fact, if true, that Ramirez had been using drugs shortly before his death was irrelevant and, therefore, there was no need to elicit testimony on that issue from the coroner. Similarly, trial counsel reasonably could have concluded that any conflict in the arguably expectable trajectory of the bullet was caused by such explicable variables as the location and direction of the gun at the time of the shooting, and whether something occurred after the bullet was fired but

before it came to rest in Ramirez's body (e.g., a ricocheted bullet or Ramirez not standing completely erect when he was shot) with the result that there was no need to elicit testimony on that issue from the coroner. Any narcotics use by Ramirez or alleged conflicts in the evidence concerning the trajectory of the bullet which killed him had little, if any, relevance to counts 3 and 4, which pertained to Escamilla and Molinar, respectively.

c. *Trial Counsel's Failures to Call An Expert Identification Witness and to Employ an Investigator.*

Appellant's counsel failed to call as a witness an eyewitness identification expert. However, appellant's counsel reasonably could have refrained as a tactical matter from presenting such testimony given the other evidence identifying appellant as the shooter. We note the court, using CALJIC No. 2.91, instructed the jury on the burden of proving identity based solely on eyewitnesses and, using CALJIC No. 2.92, instructed on factors to be considered in proving identity by eyewitness testimony.

Appellant argues in two sentences, without factual support from the record, argument, or authority, that his trial counsel provided ineffective assistance by failing to use an investigator. We reject the claim because it is raised perfunctorily, and because appellant has failed to demonstrate his trial counsel failed to use an investigator. (Cf. *People v. Jones* (1998) 17 Cal.4th 279, 305; *In re Kathy P.* (1979) 25 Cal.3d 91, 102.)

d. *Trial Counsel's Failure to Object to the Imposition of the Penal Code Section 12022.53, Subdivision (d) Enhancements.*

(1) *Pertinent Facts.*

The preconviction probation report prepared for a September 25, 2006 hearing reflects as follows. Appellant, who has two aliases, was born in October 1982. In 2003, he suffered a conviction for driving with a suspended license (Veh. Code, § 14601.1, subd. (a)) and was placed on probation for two years.[12]

[12] The report also showed appellant was arrested for participating in a speed contest (Veh. Code, § 23109, subd. (c)), presenting false identification (Pen. Code, § 148.9, subd. (a)), driving with a suspended license, and failing to provide proof of insurance (Veh. Code, § 16028, subd. (a)). The matter was scheduled for a pretrial hearing on

The probation officer stated, "The elements of the present offense speak for themselves. The defendant, without provocation, fired multiple shots at the victim striking [Ramirez,] causing his death. The behavior of the defendant demonstrated . . . the defendant's total lack of regard for human life. Also, innocent passers-by could have been injured when the defendant was shooting at the victims. The defendant's actions are reprehensible. The undersigned believes it is time the defendant understands that he cannot behave in such a violent manner and not be expected to be held accountable for his actions."

The court, without objection, sentenced appellant as previously indicated, including imposition of a term of 25 years to life pursuant to Penal Code section 12022.53, subdivision (d), as to each of counts 1, 3, and 4.

(2) *Analysis.*

Appellant argues his trial counsel provided ineffective assistance when he failed to object on cruel and unusual punishment grounds to the imposition of the Penal Code section 12022.53, subdivision (d) enhancements as to counts 1, 3, and 4. We disagree. We have set forth the pertinent facts. Appellant's trial counsel reasonably could have refrained from objecting because he believed imposition of the enhancements was not cruel and unusual punishment. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1216; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-18; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493-497, fn. 6; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-828; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 177; see *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116-1118.)

September 25, 2006. The report also shows that in 2004, a protective order was issued against appellant and in favor of two persons.

e. *Trial Counsel's Failure to Object to a Family Member's Display of Ramirez's Photograph.*

(1) *Pertinent Facts.*

Appellant moved for a new trial. Appellant argued, inter alia, that Ramirez's sister displayed a photograph of Ramirez to the jury. The motion was not supported by a declaration. The unsworn memorandum of points and authorities, signed by appellant's counsel, indicated that Ramirez's sister, seated in the courtroom, continuously displayed to the jury an 18" by 22" photograph of Ramirez.

The People filed an opposition to the motion. The unsworn opposition indicated as follows. Ramirez's sister brought a photograph of Ramirez on the first day of trial. The photograph was no larger than 8" by 10". The prosecutor told her not to display the photograph to the jury. Ramirez's sister was the only person who looked at the photograph.

At the hearing on the motion, the court indicated the following. In their opposition, the People conceded the existence of the photograph, so the court assumed "there was a photograph out there." However, the court never saw the photograph and it was never brought to the court's attention during trial. If the matter had been brought to the court's attention, the court could have ordered the photograph placed away, could have suggested that the person put the photograph away, or could have admonished the jury that they were not to base their decision on sympathy, passion, or prejudice, which the court instructed on anyway. There was no evidence to suggest that the jury's verdict was based on passion or prejudice caused by them seeing a photograph of Ramirez as they left the courtroom. The court did not think there was any evidence that the jury saw the photograph.

(2) *Analysis.*

Appellant, asserting Ramirez's family displayed to the jury the photograph of Ramirez, argues he received ineffective assistance by his trial counsel's failure to timely object to the display. We disagree. The burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P., supra*, 25 Cal.3d at p. 102.) The

record fails to demonstrate that any family member of Ramirez displayed a photograph of Ramirez in the courtroom, or that any juror saw such a photograph. Appellant conceded at trial that Ramirez had been shot and killed. Appellant conceded during his motion for a new trial that the instant issue by itself did not warrant a new trial.

f. *Trial Counsel's Opening the Door to Prosecution Evidence of Appellant's Violent Character*.

(1) *Pertinent Facts.*

The People called Jennifer as a witness at trial. During cross-examination of Jennifer by appellant, the following occurred: "Q In the whole time that you saw the defendant he was always gentle to you, he never struck you or pushed you or did anything like that, did he? [¶] A No." Jennifer then testified that appellant always appeared to be a kind person and always tried to be helpful to her. The following then occurred: "Q You never saw [appellant] be violent to you? [¶] A No. [¶] Q You never saw [appellant] violent to anybody else? A Yes."

During redirect examination, appellant's counsel indicated Jennifer had been asked a few minutes earlier if she had seen appellant "violent to [Jennifer] or anyone else and [Jennifer] said yes." Appellant's counsel then asked Jennifer what she saw. Jennifer indicated that in about 2001, appellant and her former boyfriend physically fought. That was the only time the two had fought, and Jennifer did not know how the fight started. During recross-examination, Jennifer testified no one was seriously hurt in the fight.

(2) *Analysis.*

Appellant argues his trial counsel provided ineffective assistance because counsel presented evidence of appellant's character for nonviolence, which permitted the People to rebut that testimony with evidence of appellant's character for violence, namely, his fight with Jennifer's former boyfriend.[13] We disagree.

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[13] Evidence Code section 1102, provides, "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

Jennifer's testimony that she had seen appellant be violent to someone presented evidence of appellant's character for violence, not nonviolence.

Jennifer's testimony also suggested, however, that appellant had been gentle with her and had never battered her. To that extent, her testimony was evidence of appellant's character for nonviolence. However, that testimony was favorable to appellant. Moreover, the main issue at trial was identity. There is no dispute that whoever fired the several gunshots in the present case violently murdered Ramirez, and violently attempted to murder Escamilla and Molinar, and (as we discuss later) there was sufficient evidence that appellant was the shooter. By contrast, the character evidence which the People presented pertained to a single fight of unknown origin between appellant and Jennifer's former boyfriend, and the fight, in which no one was seriously hurt, occurred four years before the present offenses.

5. *There Was Sufficient Identification Evidence As to the Crimes, and Sufficient Evidence of Premeditation and Deliberation as to Counts 1, 3, and 4.*

Appellant claims there was insufficient identification evidence supporting his convictions. We disagree. When a defendant challenges on appeal the sufficiency of the evidence, "Our power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment. [Citation.]" (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.)

We have set forth the pertinent facts in our Factual Summary. There was substantial evidence as follows. Appellant and Escamilla had a hostile relationship as a result of appellant's dating Jennifer, Escamilla's sister. According to Jennifer, appellant drove a black Chevrolet Avalanche with special rims on its wheels and televisions inside the vehicle. In August 2005, a gun was inside the truck's center console. On another occasion, appellant held the gun in his hand. Appellant's gun possession provided evidence that appellant had an opportunity to use his gun to commit the present offenses.

In August 2005, Jennifer terminated her relationship with appellant. About a week or two before Ramirez died, appellant and Escamilla argued. On September 6, 2005, appellant visited Jennifer, and was driving the Chevrolet. Hernandez testified that, on that same date, appellant said something to Hernandez about problems he was having with Escamilla, and "[appellant] said that [appellant] and Hector had like a dispute. . . . they weren't getting along and he didn't have a problem taking care of Hector." Escamilla had seen appellant driving a black Chevrolet Avalanche prior to September 7, 2005, and the vehicle had big wheels and was partially customized to look like a Cadillac Escalade.

On September 7, 2005, Escamilla saw the vehicle approach Molinar, Ramirez, and Escamilla. Escamilla identified appellant as the shooter, although Escamilla provided conflicting testimony on whether appellant was the shooter. Escamilla recognized appellant's voice at the time of the shooting. Escamilla saw appellant drive by Escamilla's house after the shooting, although Escamilla provided conflicting testimony as to whether the person who drove by was appellant. Escamilla selected appellant's photograph from a photographic identification folder as the person who committed the crime.

On September 7, 2005, Molinar saw a black Chevrolet Avalanche or an Escalade with spinner rims, and probably four or five televisions inside the vehicle. The driver made statements, then started shooting. Molinar recognized the driver's voice as the voice of appellant. After the shooting, Molinar ran home and told Hernandez that Tomba, appellant's nickname, shot Ramirez. Molinar went to the police station and told police that appellant was the driver of the truck. Molinar initially denied to police that he had seen the shooter because Molinar feared retaliation against his family if he told police the truth. The next day, however, he changed his mind because he wanted to see appellant incarcerated for what he had done, so he told police that appellant was the shooter. Molinar testified he saw the shooter's face, but presented conflicting testimony on this issue.

Molinar selected appellant's photograph from a photographic identification folder as the person who shot Ramirez. At the preliminary hearing, Molinar testified, inter alia, that Escamilla had had an ongoing argument or battle with appellant because of Escamilla's sister, and Escamilla told appellant that if appellant did not leave Escamilla's sister alone, something very bad was going to happen; this was evidence of the prior quarrel between Escamilla and appellant, and evidence of motive. Appellant effectively disappeared after the shooting, and police detained him several months later in Las Vegas. We conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant committed the crimes of which he was convicted, including sufficient identification evidence. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

Appellant also claims there was insufficient evidence of premeditation and deliberation as to counts 1, 3, and 4. We disagree. For purposes of addressing this claim, there is no dispute that appellant shot from a motor vehicle at Ramirez (count 2), murdering Ramirez (count 1) and attempting to murder Escamilla and Molinar (counts 3 & 4, respectively).

Moreover, in part 2 of our Discussion, as part of our demonstration that any trial court error in giving CALJIC No. 8.66.1 was not prejudicial to appellant's convictions on counts 3 and 4, we discussed, inter alia, the evidence that appellant intended to kill Escamilla and Molinar. That discussion, which is incorporated here, is also pertinent to show that appellant harbored premeditation and deliberation as to counts 1, 3, and 4. We conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant committed the crimes of which he was convicted in counts 1, 3, and 4, with premeditation and deliberation. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)[14]

[14] Since we have rejected appellant's sufficiency contention, there is no need to consider appellant's contention that we should reduce his convictions to convictions for any lesser included offense(s).

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.